167

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No. 10-18

IN THE

Supreme Court of the United States

WEBSTER M. SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Armed Services

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Table of Contents

Table Of Authorities ii

Interest Of *Amicus Curiae* 1

Introduction 2

Statement 3

Reasons for Granting the Petition 7

I. Under De Novo Review, the Court of Appeals Would Have Concluded that the Limitations on Cadet Smith's Cross-Examination of His Accuser Violated The Confrontation Clause. 7

II. The Standard of Review is Likely to Be Dispositive In Cases Throughout the Country 16

Conclusion 20

Table Of Authorities

Cases

Brady v. Maryland,
373 U.S. 83 (1963) 9

Chambers v. Mississippi,
410 U.S. 284 (1973) 3

Commonwealth v. Bohannon,
378 N.E.2d 987 (Mass. 1978) 9

Davis v. Alaska,
415 U.S. 308 (1974) 11, 12, 15

Hannon v. State,
84 P.3d 320 (Wyo. 2004) 13, 14

Michigan v. Lucas,
500 U.S. 145 (1991) 13

Obiazor v. United States,
964 A.2d 147 (D.C. 2009) 9

Olden v. Kentucky,
488 U.S. 227 (1988) (per curiam) 11, 12, 13

Redmond v. Kingston,
240 F.3d 590 (7th Cir. 2001) 10

United States v. Collier,
67 M.J. 347 (C.A.A.F. 2009) 8

United States v. James,
61 M.J. 132 (C.A.A.F. 2005) 17, 18

United States v. Jimenez,
464 F.3d 555 (5th Cir. 2006) 15

United States v. McElhaney,
54 M.J. 120 (C.A.A.F. 2000) 7

United States v. Robinson,
583 F.3d 1265 (10th Cir. 2009) 18, 19

United States v. Rosa,
11 F.3d 315 (2d Cir. 1993) 17

United States v. Scheetz,
293 F.3d 175 (4th Cir. 2002) 18

United States v. Vega Molina,
407 F.3d 511 (1st Cir. 2005) 18

United States v. Velarde,
485 F.3d 553 (10th Cir. 2007) 10

United States v. Wilmore,
381 F.3d 868 (9th Cir. 2004) 14, 18

White v. Coplan,
399 F.3d 18 (1st Cir. 2005) 9, 14

Other Authorities

Military Rule of Evidence 412(a) 5

Interest Of *Amicus Curiae*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct.[1] Founded in 1958, NACDL has a membership of more than 11,000 and affiliate memberships of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases, including in cases in which the Court has recognized the importance of the rights protected by the Confrontation Clause. The Court's review of this case is critical to ensuring that trial courts do not unduly limit criminal defendants' rights to cross-examine key witnesses against them—rights that ensure the

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of *amicus*'s intention to file this brief.

integrity and preserve the truth-seeking function of the criminal trial.

Introduction

Petitioner Webster Smith's rights under the Confrontation Clause were violated by restrictions on his ability to cross-examine his accuser about her motive to fabricate sexual assault allegations against him. Had the court of appeals reviewed these restrictions de novo, as would have five other circuits, Cadet Smith's confrontation rights would have been vindicated; reviewing for abuse of discretion, however, the court of appeals upheld the limitations and affirmed his convictions by a vote of 3–2. Moreover, the conflict in the circuits over the correct standard of review is producing disparate results nationwide. The Court should resolve this conflict because it implicates an issue of fundamental importance, the scope of a defendant's constitutional right to confront his accusers.

First, Cadet Smith would have prevailed on appeal had review been de novo because the excluded cross-examination was central to establishing a pattern of false accusations by his accuser and her motive to implicate him. The dispute at trial was whether his sexual encounter with his accuser was coerced or consensual. Yet the trial judge prohibited Cadet Smith from cross-examining his accuser about a prior instance in which she had falsely alleged that a consensual encounter (with an enlisted man) was coerced. Courts in circuits that review de novo have overturned sexual assault convictions tainted by similar restrictions, and they have recognized that

information about prior false allegations of sexual assault is essential to a jury's assessment of an accuser's credibility. This Court's precedents confirm that the trial court erred in prohibiting Cadet Smith from eliciting this critical information.

Second, the standard of review affects not just this case, but others nationwide. Courts applying de novo review give meaningful scrutiny to limitations on cross-examination that implicate the Confrontation Clause and give full effect to defendants' constitutional right to thoroughly examine their accusers' credibility; courts reviewing for abuse of discretion far more readily uphold such restrictions. Thus, constitutional violations that are redressed in the circuits that review de novo would be left undisturbed in circuits that review only for abuse of discretion.

"The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth determining process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Considering the importance of a defendant's right to cross-examine his accusers, the divergent protection of this right across the circuits warrants this Court's attention. The petition should be granted.

Statement

Webster Smith, a cadet at the Coast Guard Academy, was convicted of sexually assaulting a female classmate ("SR"). He maintained that the encounter was consensual. SR had recently falsely accused an enlisted man of sexual assault. She later

admitted that this encounter was consensual (and thus a violation of Coast Guard Academy rules that could have resulted in her expulsion and criminal prosecution). The trial court prohibited Cadet Smith from cross-examining SR about her prior false accusation, which Cadet Smith sought to introduce as evidence of her motives to fabricate, and pattern of fabricating, allegations of sexual assault because she feared military discipline and possibly criminal prosecution.

The False Accusations. SR initially told Cadet Smith that her previous sexual encounter—which had generated rumors among enlisted personnel—was not consensual. Pet. App. 60a. With SR's approval, Cadet Smith "informed the enlisted personnel who were spreading the rumors that the conduct was not consensual." *Id.* But SR ultimately told Cadet Smith that "the incident with the enlisted man had been a consensual encounter and that the scope of the encounter had been greater than she had previously described." *Id.*

In this case, SR alleged that Cadet Smith sexually assaulted her in the Academy dormitory. She did not allege that Cadet Smith used physical force. Rather, she claimed that he coerced her into engaging in sexual activity by suggesting that he needed "motivation" to continue to counteract rumors about her previous consensual sexual encounter with an enlisted man. *Id.* at 3a.

The Trial. At trial, Cadet Smith sought to cross-examine SR about her prior false accusation. He sought to use this evidence to "establish [SR's] pat-

tern of lying about sexual events," *id.* at 4a, in order to "protect herself from discipline," *id.* at 27a. Under cadet regulations, "sexual conduct is prohibited on Coast Guard Academy installations even if it is between consenting cadets." *Id.* at 16a n.3. Cadets who violate this prohibition can be expelled. *Id.*

The government argued that this line of questioning was barred by Military Rule of Evidence 412(a), which precludes evidence of an alleged victim's prior sexual behavior unless the exclusion of such evidence would violate the accused's constitutional rights. *Id.* at 61a. The trial judge concluded that the Confrontation Clause did not entitle Cadet Smith to cross-examine SR about her prior false accusations of sexual assault. *Id.* at 61a–64a.

Instead, the trial judge permitted Cadet Smith to inform the jury only that his accuser had a "secret" that "if revealed could have an adverse impact on her Coast Guard career, including possibly disciplinary action under the UCMJ." *Id.* at 62a. The trial judge believed that Cadet Smith's Confrontation Clause right was protected by this "generic formulation." *Id.* As relevant here, the jury found Cadet Smith guilty on the three counts relating to his sexual encounter with SR.

The Appeals. On appeal, a divided Coast Guard Court of Criminal Appeals affirmed. *Id.* at 23a–33a. The dissent concluded that the trial court's restrictions on Cadet Smith's cross-examination violated the Confrontation Clause. According to the dissent, had Cadet Smith been permitted to show that his accuser had falsely accused another person of sexual

assault following a consensual encounter, "members could [have] infer[red] that she had followed a similar scheme in fabricating a false complaint of indecent assault against [Cadet Smith]." *Id.* at 42a–43a. The dissent noted that "the Government made first use of evidence of SR's secret in its case-in-chief to prove that she was extorted and coerced into sexual relations with [Cadet Smith]," *id.* at 41a, yet the trial judge's ruling precluded Cadet Smith from countering the government's theory "by showing the depths of SR's fear [of disclosure of the secret] and the lengths she allegedly had gone—and was prepared to go—to shield the facts of her misconduct," *id.* at 43a. Moreover, by requiring euphemistic references to a "bad situation" or "secret," *id.*, the trial judge "allowed the Government to create a substantially different impression of [SR's] truthfulness than what the defense had sought to show through the excluded evidence," *id.* at 41a.

The Court of Appeals for the Armed Forces also divided on the Confrontation Clause issue and affirmed by a vote of 3–2. *Id.* at 1a–21a. Both the plurality and concurring opinions upheld the trial judge's ruling after reviewing it for abuse of discretion. *Id.* at 5a, 8a–10a. The dissent countered that the trial judge's ruling "deprived Smith of his best opportunity to provide a motive for SR's allegations and to challenge her credibility." *Id.* at 19a. Instead, with "limited information about SR's secret, the [jury] members were left to speculate whether the secret was a minor disciplinary infraction or a more serious charge, but they had no idea that the proffered evidence directly implicated SR's motive" to "lie

about the consensual nature of her sexual activities to protect her career." *Id.* at 19a, 21a. The dissent would have reversed because the jury never heard Cadet Smith's "commonsense explanation for SR's claim that the sexual activity was nonconsensual." *Id.* at 21a.

Reasons for Granting the Petition

I. Under De Novo Review, the Court of Appeals Would Have Concluded that the Limitations on Cadet Smith's Cross-Examination of His Accuser Violated The Confrontation Clause.

The ultimate result in Cadet Smith's case hinges on the issue identified in the petition and on which the circuits diverge: whether challenges to limitations on cross-examination that implicate the Confrontation Clause are reviewed de novo or for abuse of discretion. The court of appeals reviewed the trial judge's limitations on cross-examination for abuse of discretion. A court reviewing de novo would have reached a different result.

A. Although the trial court's restrictions on Cadet Smith's cross-examination of his accuser hamstrung his defense, his opportunity to secure appellate relief was narrow. The precedent of the Court of Appeals for the Armed Forces required Cadet Smith to establish that the trial judge's ruling "was arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quotations omitted). Indeed, that court will uphold restrictions on cross-

examination if the trial judge merely "articulate[d] [his] balancing analysis on the record." *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009).

In applying that deferential standard, the court of appeals failed to meaningfully address Cadet Smith's argument that cross-examination of his accuser about her prior false allegations of sexual assault would have established her specific motive to fabricate the sexual assault allegations against him. Specifics about SR's "secret" were critical to bolstering Cadet Smith's defense that SR would go to great lengths to protect her career and avoid possible criminal prosecution. The jury might have had little reason to believe that SR would have falsely accused someone of sexual assault to avoid potential military discipline or prosecution unless Cadet Smith could establish that she had done so once before.

In addition, upon learning that this was SR's second unlawful, consensual sexual encounter in the military environment, the jury would have better understood the intensity of her desire to lie. However weighty the risk of discipline that normally might accompany consensual sexual activity in a Coast Guard dormitory, discipline presumably would have been more certain and severe after a second unlawful encounter than after just one.

As a result, a court reviewing de novo almost certainly would have granted Cadet Smith relief. For instance, the First Circuit held under a de novo standard that a defendant's rights under the Confrontation Clause were violated by limitations on his ability to cross-examine his accusers about prior

false allegations of sexual assault. *White v. Coplan*, 399 F.3d 18 (1st Cir. 2005) (Boudin, J.). In *White*, two girls accused the defendant of sexual assault; the trial court prohibited the defendant from examining them about their prior false allegations. *Id.* at 20. In reversing, the First Circuit found it significant that "[t]he past accusations were about sexual assaults, not lies on other subjects." *Id.* at 24. Because the past accusations involved the same conduct of which the defendant was accused, the court concluded that "[i]f the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive"—"very potent proof in [the defendant's] favor." *Id.*

Other courts have reached the same conclusion. The Massachusetts Supreme Judicial Court overturned a defendant's rape conviction after the trial judge precluded him from examining his accuser about a prior false rape allegation; the accuser's credibility might have been "seriously damaged" by "[e]vidence of prior false accusations of the specific crime which is the subject of the trial." *Commonwealth v. Bohannon*, 378 N.E.2d 987, 991 (Mass. 1978). Likewise, the D.C. Court of Appeals held that the Confrontation Clause required reversal of a defendant's sexual assault conviction because the trial court should have "allow[ed] cross-examination on the subject of [the accuser's] prior sexual allegation to support [the] defense's bias theory." *Obiazor v. United States*, 964 A.2d 147, 153 (D.C. 2009).[2]

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[2] Similarly, in considering a sexual-assault defendant's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), the Tenth Circuit

A meaningful cross-examination about SR's prior false allegation was especially important to allow Cadet Smith to provide context to the jury for a defense that might otherwise have seemed farfetched. In *Redmond v. Kingston*, the Seventh Circuit recognized the importance of providing such context. 240 F.3d 590 (7th Cir. 2001) (Posner, J.). There, applying de novo review, the court held that a trial court's refusal to permit cross-examination of the accuser about her prior false allegation of rape violated the Confrontation Clause. While the trial court had ruled that such examination "was cumulative of other evidence" that the accuser "had told lies in the past," the Seventh Circuit observed that "none of the other [admitted] evidence either involved a false charge of being sexually assaulted or furnished a motive for such a charge." *Id.* at 591 (quotations omitted). Cross-examination about the prior rape allegation could have established a motive, the court concluded, "for what would otherwise be an unusual fabrication [against the defendant]." *Id.* at 592.

3. The court of appeals also improperly deferred to the trial judge's suggestions that the prohibited line of cross-examination was embarrassing, distracting, unreliable, and unrelated. A more searching review would have revealed that the trial judge misapplied the law in invoking these concerns.

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concluded that the accuser's prior, false accusations of sexual assault created a "reasonable probability that, had the defense known of this evidence, the result of the proceeding would have been different." *United States v. Velarde*, 485 F.3d 553, 563 (10th Cir. 2007) (McConnell, J.).

1. The court of appeals improperly deferred to the trial court's concern about "unfair prejudice to [the accuser's] privacy interests." Pet. App. 64a. Because the defendant's right of confrontation trumps concerns about embarrassment to his accuser, a court reviewing de novo would have reached a different conclusion.

This Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974), is instructive. In that case, one of the state's key witnesses against the defendant was on probation from a juvenile conviction. The defendant sought to cross-examine the witness about his "vulnerable status as a probationer" and about his "possible concern that he might be a suspect in the investigation." *Id.* at 318. The trial court, however, accepted the prosecution's argument that "exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures" and "cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgressions." *Id.* at 319. This Court held that these concerns—including that "embarrassment might result to [the witness] or his family by disclosure of his juvenile record"—were "outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial [prosecution] witness." *Id.*

In *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam), this Court reaffirmed the importance of cross-examination into an accuser's motivation—even if it might embarrass her—in a case involving allegations of sexual assault. In *Olden*, a white

woman accused a black man of rape. *See id.* at 228–32. The defendant maintained that the sex was consensual, and he sought to introduce evidence that his accuser lied to avoid jeopardizing her romantic relationship with another man (who the jury knew was black). *Id.* at 232. The trial court forbade the defendant from pursuing this cross-examination, concerned that "revealing [her] interracial relationship would prejudice the jury against her." *Id.* In reversing, the Court reiterated that concerns about embarrassment to the accuser, even as relates to sex, "cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [her] testimony." *Id.*

So too here. It was not enough for the trial court to invoke the "high value we as a society place on keeping our sexual behavior private." Pet. App. 61a. However substantial this concern under the rules of evidence, it "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Davis*, 415 U.S. at 320. The force of the Court's holdings in *Davis* and *Olden* is especially strong here, since Cadet Smith sought to cross-examine SR not on the details of the previous sexual encounter itself, "but rather the allegation that SR had previously lied about a sexual encounter under similar circumstances." Pet. App. 18a (Erdmann, J., dissenting).

2. The court of appeals further erred in deferring to the trial court's concern about "the potential danger of sidetracking [the jury's] attention." Pet.

App. 64a. In this classic case of he-said/she-said, the accuser's motive to lie was anything but collateral.

Even when concerns about distracting the jury are legitimate, "[r]estrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence may not be arbitrary or disproportionate to the purposes they are designed to serve." *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (quotations omitted). Especially in light of less restrictive alternatives such as limiting instructions, generalized concerns over "confusion of issues" must yield to the "strong potential [of cross-examination] to demonstrate the falsity of [the accuser's] testimony." *Olden*, 488 U.S. at 232.

Here, Cadet Smith's proposed line of questioning would not even have distracted the jury, because SR was the only witness against him as to the sexual assault charges. Cases such as *Hannon v. State*, 84 P.3d 320 (Wyo. 2004), instruct that when the lone witness's motive to lie is central to the case, limitations on cross-examination are especially suspect. In *Hannon*, the accuser implicated the defendant in a sexual assault only after the accuser himself was questioned by police about his role in sexually assaulting someone else. *Id.* at 332. The trial court prohibited the defendant from cross-examining the accuser about his motive to deflect attention away from his own sexual improprieties. In reversing the conviction, the Wyoming Supreme Court noted the centrality of the accuser's motive where—as here—the accuser is the lone witness against the defendant. *See id.* Whatever the residual risk of side-

tracking the jury, the court concluded, the defendant was entitled "to fully explore this before the jury." *Id.*[3]

Not only was SR's "secret" the core of Cadet Smith's defense, but there was little risk of an interminable sideshow. Cadet Smith sought only to question his accuser about the prior incident; he did not seek to introduce extrinsic evidence that might have bogged down the trial. Other courts have recognized that "[i]f the witness were prepared to admit on the stand that a prior accusation of similar nature was false," then "[n]o time-consuming excursion beyond the witness would be required." *White*, 399 F.3d at 25.

3. Third, the court of appeals improperly deferred to the trial court's reliance on its own assessment of Cadet Smith's credibility in precluding his proposed line of cross-examination. The trial court discounted the evidence of the prior false allegation as "not strong" because it "comes from the accused, who has an obvious bias." Pet. App. 63a.

But it was not for the trial judge to resolve whether Cadet Smith or his accuser was telling the truth. Courts applying de novo review recognize that it is improper to assume that a prosecution's witness—who, as here, herself may "have an obvious

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[3] *See also, e.g., United States v. Wilmore*, 381 F.3d 868, 870 (9th Cir. 2004) (defendant entitled to cross-examine witness about prior false allegations against him, notwithstanding trial judge's desire to avoid "a circus" that would result from the witness's repeated invocation of the Fifth Amendment).

bias"—is telling the truth. *See United States v. Jimenez*, 464 F.3d 555, 559–62 (5th Cir. 2006).

As this Court explained in *Davis*, a court "cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it." 418 U.S. at 317. To the contrary, "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the accuser's] testimony." *Id.*

4. Finally, the trial judge improperly concluded that "even if [SR] falsely told [Cadet Smith] in confidence that her sexual encounter with the enlisted man was nonconsensual in an effort to suppress rumors, this would have little value in proving that her official allegations against Cadet Smith resulting in a public trial are also false." Pet. App. 64a (emphasis omitted).

For one, SR's first set of false allegations were more than private. She not only shared the false allegations with Cadet Smith, but allowed him to tell others that the enlisted man had sexually assaulted her—in order to counter public rumors that she had engaged in unlawful consensual sexual activity. And SR would have known that her first set of false allegations, once they went public, could have reached law enforcement and resulted in the enlisted man's prosecution.

Even more importantly, both sets of allegations formed a single course of conduct. The prosecution

used SR's "secret" to make its case. As the dissent in the Coast Guard Court of Criminal Appeals correctly explained, "the prosecution was able to present evidence that SR was coerced into unwanted sexual relations with [Cadet Smith] by the implied threat that he would reveal the facts of her 'bad situation.'" *Id.* at 43a. But the defense was prohibited from highlighting that the nature of this "secret" reflected a pattern of SR's false allegations of sexual assault and supplied a motive for her to falsely accuse Cadet Smith. The unnamed "secret" suggested that SR was coerced without physical force; only the details of that secret would have exposed SR's pattern of false allegations of coerced sexual activity to avoid military discipline.

* * *

An unexplained "secret" about an undisclosed "bad situation" is one thing. A pattern of false allegations about sexual assault is quite another. Without the chance to cross-examine his accuser about the details of her prior false accusation, Cadet Smith's right to confrontation was irreparably impaired. Because a court reviewing de novo could not have held otherwise, this case presents an ideal vehicle to resolve the circuit conflict identified in the petition.

II. The Standard of Review is Likely to Be Dispositive In Cases Throughout the Country.

The effect of deferential review on Cadet Smith's case is not unique. The difference between review de

novo and for abuse of discretion is likely to affect the outcome in Confrontation Clause appeals nationwide: the deferential standard applied by some circuits leads them to reject meritorious Confrontation Clause claims that would likely be successful in circuits reviewing de novo.

Courts reviewing for abuse of discretion tend to uphold decisions providing only minimal latitude for defendants to cross-examine even key witnesses against them. For example, in *United States v. Rosa*, 11 F.3d 315 (2d Cir. 1993), the Second Circuit upheld restrictions on cross-examination of a federal agent about gaps in his written report. Reviewing for abuse of discretion, the court determined that the "challenged testimony was so strongly corroborated by others officers participating in the same surveillance who testified to the same observation, that it was highly unlikely that the jury would have drawn any adverse inference from the absence of mention of the event in the first agent's written report." *Id.* at 337.

Similarly, in *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005) the Court of Appeals for the Armed Forces upheld limitations on cross-examination about the witness's plea agreement, since the jury was already aware of the plea agreement and "limiting the cross-examination simply precluded additional questioning on the subject." *Id.* at 135. And in *United States v. Scheetz*, 293 F.3d 175 (4th Cir. 2002), the Fourth Circuit upheld the district court's preclusion of questioning witnesses about minimum and maximum sentences, because the judge had in-

structed the jury about how the sentencing process operates generally. *Id.* at 184.

Under de novo review, by contrast, courts afford defendants the necessary leeway to thoroughly explore the credibility of key prosecution witnesses. Thus, in *United States v. Vega Molina*, 407 F.3d 511 (1st Cir. 2005), the First Circuit reversed the defendant's conviction after the trial court prohibited him from cross-examining an alleged co-conspirator about details of her prior criminal acts, because such questioning "had the potential" to undermine her credibility. *Id.* at 523. And in *United States v. Wilmore*, 381 F.3d 868 (9th Cir. 2004), the Ninth Circuit overturned restrictions on cross-examination about inconsistencies in the witness's testimony even though it was "impossible to know what such cross-examination would have revealed, if anything at all." *Id.* at 873.

The disagreement between the majority and dissent in a recent Tenth Circuit case illuminates how Confrontation Clause appeals can turn on the standard of review. In *United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009), the Tenth Circuit majority—reviewing de novo—held that the Confrontation Clause required that the defendant be permitted to cross-examine an informant about his mental health history. *Id.* at 1275. Conducting its own analysis, the majority concluded that the excluded cross-examination "into the [informant's] mental health history may have undermined [his] credibility as a witness." *Id.* The dissent, however, applied a different standard and reached a different result. Noting

that the district court had concluded that such evidence would have been more prejudicial than probative, the dissent stated, "I cannot say the district court abused its discretion." *Id.* at 1281 (Tymkovich, J., dissenting).

As these cases confirm, the conflict over the standard of review in Confrontation Clause cases is not academic. When appellate courts review for abuse of discretion, defendants such as Cadet Smith are unable to redress violations of their constitutional confrontation rights, even when relief would be available from courts reviewing de novo. Given that the different standards of review will often produce different outcomes—in cases about a constitutional protection fundamental to the fairness of criminal trials—the Court should grant the writ of certiorari and resolve the question presented.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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